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No. 05-915

In the
Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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Kahlenberg, Richard D., The Century Foundation, *Economic School Integration: An Update*, Sept. 16, 2002, *available at* http://www.tcf.org/Publications/ducation/economicschoolintegration.pdf 18

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McGlothlin, Heidi, et al., *European-American Children's Intergroup Attitudes about Peer Relationships*, BRITISH JOURNAL OF DEVELOPMENTAL PSYCHOLOGY, vol. 23, 2005, at 227 10

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Pettigrew, Thomas F. & Tropp, Linda R.,
A Meta-Analytic Test of Intergroup Contact Theory, JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY, vol. 90, 2006, at 751 10

INTRODUCTION

In support of its extraordinarily broad claim of authority to use race to assign students to public schools, Respondents argue that the judgment of elected school boards to use race to discriminate against schoolchildren is entitled to deference. Respondents' Brief (Resp. Brf.) at 29. Such a claim departs from the command of equality contained in the Equal Protection Clause and is indistinguishable from an interest in outright racial balancing, which this Court has repeatedly admonished does not justify race-based decisionmaking. Respondents assert that social science research (that is not uniform, consistent, or conclusive) can support their claim that racial balancing constitutes a compelling state interest. What Respondents ask for is an exception to the nondiscrimination principle for locally elected K-12 public school boards, so that they can decide, with virtually unfettered discretion, what kind and degree of racial mix of schoolchildren, ages 5 to 18, should be assembled in our public schools. This Court has never before approved such a standardless warrant for racial discrimination in K-12 under the exacting requirements of strict scrutiny. It should not do it now. Finally, Respondents ignore the unique harm created and imposed on pupils by their racial balancing policy—including the stigma of racial classification and racial balancing itself. Last, even if this Court were to accept the notion that Respondents have a compelling state interest, these measures cannot be, and are not, narrowly tailored.

ARGUMENT

I

PLAINTIFF HAS STANDING TO BRING THIS ACTION

The "injury in fact to a cognizable interest" necessary to establish standing in an equal protection case is the denial of

equal treatment resulting from the imposition of a barrier, not the ultimate ability to obtain the benefit. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003); *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666 (1993). The District Court found, and Respondents concede, that Joshua McDonald's application to transfer to another elementary school was denied because of his race. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837 n.3 (W.D. Ky. 2004); Resp. Brf. at 10. It is therefore of no significance that the school Joshua McDonald was forced to attend had similar educational programs. Joshua will face the same discriminatory program when he applies to middle school and high school. *See* Resp. Brf. at 46-47. In *Gratz*, petitioner Hamacher was denied admission to the University of Michigan's undergraduate school even though an underrepresented minority applicant with his qualifications would have been admitted. Hamacher was able to satisfy the requirements of standing by showing that "he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions." *Gratz*, 539 U.S. at 262. In the instant case, it has never been disputed that Joshua was "able and ready" to attend the school that he was denied admittance to by reason of his race, and that but for the District's discriminatory policy, Joshua would have enrolled in the school to which he sought a transfer.

Because Joshua was denied admittance to the school of his choice by reason of his race, and it is not disputed that but for his race he would have been granted the transfer, there can be no question that Joshua suffered an injury in fact sufficient to grant him standing to pursue his claim of damages under *Gratz*, *Northeastern Fla. Chapter* and their progeny. *See* Joint Appendix (JA) at 9 (Third Amended Complaint seeking damages for plaintiff).

II

RESPONDENTS' PLAN AMOUNTS TO "OUTRIGHT RACIAL BALANCING" AND IS THEREFORE PRESUMPTIVELY UNCONSTITUTIONAL

Absent the need to remedy a prior constitutional violation or to generate the specific kind of diversity identified in *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), a goal of "assur[ing] within [a] student body some specified percentage of a particular group merely because of its race" cannot justify the use of race in making student placement decisions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J. opinion). Indeed, this Court has repeatedly admonished that "outright racial balancing" is "patently unconstitutional." *Grutter*, 539 U.S. at 330; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). As this Court explained in *Freeman v. Pitts*: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 503 U.S. 467, 494 (1992).

Here, Respondents cannot assert that their plan is remedial. Any lingering effects of the previous dual school system operated by Respondents have been eliminated. *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) ("To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects"). *After* Respondents were discharged from the consent decree, they chose to adopt the racial balancing plan at issue here. Respondents' overall student assignment plan is designed to achieve a pre-set racial mix of black and white students in the public schools. This is simple racial balancing, which the Constitution forbids.

Respondents compelling interest boils down to their unsupported assertion that the Jefferson County public schools

will become resegregated if they do not use a racial balancing plan. Resp. Brf. at 23. By "resegregation," Respondents do not mean that black students will be intentionally excluded. Rather, they use this provocative term to indicate that certain schools will have fewer black students than others because of housing patterns. In *Freeman*, 503 U.S. at 494, this Court stated plainly that "[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." *See Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) ("the Constitution is not violated by racial imbalance in the schools, without more").

III

DEFERENCE TO LOCAL BOARDS ON THE USE OF RACE IN PUBLIC SCHOOLS IS INCOMPATIBLE WITH THE EQUAL PROTECTION CLAUSE

There should be no mistaking what the Respondents and their *amici* are asking this Court to do. They seek a decision that permits locally elected school boards to decide, with virtually unfettered discretion, what kind and quantity of racial mix of schoolchildren should be assembled in the public schools under their control. Resp. Brf. at 29. The argument that local officials should be granted deference in deciding whether and how to employ race in the service of educating our children is one that has previously been made and rightly rejected by this Court. It should not be given credence now, fifty-two years after *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The following year in *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*), this Court declared that the ultimate objective in eliminating *de jure* segregation is to "achieve a system of determining admission to the public schools on a nonracial basis."

Far from having any support in modern jurisprudence, Respondents' view represents a troubling departure from the

demands of strict scrutiny to which all governmental racial classifications must be subjected. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223 (1995), this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). In *Grutter*, this Court said "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' " *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227). In *Johnson v. California*, 543 U.S. 499, 507-508 (2005), this Court rejected the application of any lesser standard than strict scrutiny. All racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223, and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Thus, this Court's decisions repeatedly confirm that all racial classifications are subject to the "strictest of judicial scrutiny," regardless of the allegedly benign motives and good intentions of the government.

Further, in *Grutter*, the deference accorded officials sprang from the university's unique First Amendment interests. *Grutter*, 539 U.S. at 328-29. Similarly, in *Bakke*, Justice Powell made it clear that his analysis considered only whether diversity could be a "constitutionally permissible goal for an institution of higher education" such as the medical school. *Bakke*, 438 U.S. at 311-12 (Powell, J., opinion). The First Amendment rights of institutions of higher education are not part of the education mission of K-12 public schools. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), and cases cited therein.

Respondents do an admirable job of supporting what is not contested, i.e., that the indisputably important task of educating children is properly and best discharged by parents, teachers, and state and local officials citing to *Kuhlmeier*, 484 U.S. at 273 (school officials' discretion to promulgate rules of

conduct). Respondents cite in this context *Epperson v. Arkansas*, 393 U.S. 97 (1968). Resp. Brf. at 30. In *Epperson*, this Court recognized that courts will not intervene in conflicts arising in the daily operation of school systems as long as they "do not directly and sharply implicate basic constitutional values. On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Id.* at 104. Here, of course, Respondents' actions are implicating core constitutional values by assigning students on the basis of race to public schools in violation of the Equal Protection Clause.

Clearly, local school boards do not receive special dispensation from the dictates of the Equal Protection Clause by virtue of the *general* importance of their responsibility to educate the state's schoolchildren. "The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). Indeed, no court has ever held that the strict scrutiny that otherwise applies to racial classifications is diluted or otherwise subordinate to the deference accorded local school boards in the discharge of their administrative functions.

This Court uses strict scrutiny to test the validity of the means chosen by a state to accomplish its race-conscious purposes. In *Johnson*, 543 U.S. at 512, this Court refused to defer to the judgment of state prison officials on race even where "those officials traditionally exercise substantial discretion;" in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality), this Court rejected a school board's judgment regarding the educational benefits of a racially diverse faculty; and in *Goss v. Lopez*, 419 U.S. 565, 574 (1974), this Court held that the "Fourteenth Amendment . . . protects citizen[s] against the State itself and all of its creatures—Boards of Education not excepted."

The assertion that Respondents' racial balancing plan is intended to bestow a benefit upon historically disadvantaged students does not justify, much less require, a more lenient standard of review. In *Croson*, 488 U.S. at 469, this Court invalidated an elected local city council's voluntary race-based preference program, fearing that it was adopted for the purpose of "racial politics." The enactment of racially discriminatory programs merely as a part of the political process to better the condition of one group is not permitted under the Constitution. *Croson*, 488 U.S. at 495-96. As pointed out in Pacific Legal Foundation, et al.'s Amicus Brief at 9, elected school boards, like elected city councils, are not insulated from the temptation of "racial politics." "Racial politics" not only helps one's own race, it is used to curry votes. Respondents concede that their racial balancing plan is responsive to its constituents and thus, is political in nature. Resp. Brf. at 20.

Moreover, Respondents acknowledge that their racial balancing plan is designed to remedy the "community's segregated housing patterns." Resp. Brf. at 23. This is nothing less than an attempt to impose racially discriminatory classifications to offset general societal discrimination, which has been forcefully rejected by this Court. *See Wygant*, 476 U.S. at 274.

Respondents' reliance on dicta in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971), is of little weight.[1] Resp. Brf. at 31. Decided 18 years before *Croson* settled the question of the level of scrutiny to apply to all race-based classifications, the language of *Swann* implies that a school board's use of race-based classifications is subject

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[1] "The language quoted in Respondents' brief was mistakenly attributed to *Swann v. Charlotte-Mecklenburg*, 402 U.S. at 16. However, the quoted language actually appears in the companion case of *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

to the same deferential standard of review as any other decision arising from the board's plenary power to establish and implement educational policy. This Court's pronouncement in *Croson*, *Johnson*, *Adarand*, and *Grutter*, that all racial classifications are subject to strict scrutiny absolutely forecloses any such implication.

Furthermore, *Swann* did not address the level of scrutiny to be given to local school boards' political decisions; rather, it addressed the wholly distinct issue of the scope of federal court powers to adopt desegregation policies where the governing school district has failed to do so. Within this context, this Court recognized that "[r]emedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16.

If one had to choose a context in which deference would NOT be appropriate—based on the experiences of the past half century of local school districts making race-based student assignments—one would be hard pressed to find a better choice than a local school board imposing nonremedial race-based school assignments because the policy is favored by its political constituency.

IV

RACIAL BALANCING IS NOT A COMPELLING INTEREST SUFFICIENT TO JUSTIFY DISCRIMINATING AGAINST STUDENTS IN K-12 PUBLIC SCHOOLS

A. Social Science Research Does Not Support the Conclusion That Racial Diversity Provides Educational Benefits to Students

Respondents' assertion that its racial balance plan "provides important education benefits," Resp. Brf. at 24, is based primarily on controversial and one-sided social science

evidence introduced at trial. *See* Resp. Brf. at 35. Respondents also claim that "this Court's conclusion . . . must ultimately be based on this record," *id.*, rendering the numerous studies and discussion presented in the *amicus curiae* briefs irrelevant. Petitioner respectfully disagrees. Whether racial balance plans produce educational benefits that rise to a compelling state interest is an urgent and critical issue. In *Grutter*, this Court recognized and evaluated *amici* arguments on precisely this question. 539 U.S. at 328, 330-32. There is an even greater need to do so here; the very limited record fails to reflect the sheer volume and complexity of social science research that is reviewed in *amici* briefs.[2]

Petitioner agrees with the Brief *Amicus Curiae* of Armor, Thernstrom, and Thernstrom filed in support of Petitioner whose well-documented brief notes that "the scholarship discussing the relationship between attendance at racially diverse or integrated schools and student achievement is not uniform, consistent, or sufficiently conclusive to support a finding that achieving a particular degree of racial balance constitutes a 'compelling' state interest." Thus, Petitioner disagrees with both *amici* American Educational Research Association (AERA) and the 553 social scientists who assert that the Armor brief relies on a small number of older studies and ignores more recent ones demonstrating educational benefits.

The more recent studies AERA's *amici* claim are allegedly ignored by Armor are three on race relations and two on achievement. One is a meta-analysis of over 500 smaller studies, many of which do not deal with K-12 desegregation.

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[2] The *amici* briefs most relevant to this discussion are those by Armor, Thernstrom, and Thernstrom; Murphy, Rossell, and Walberg; the American Educational Research Association; and 553 Social Scientists.

Thus it is of marginal relevance.[3] The other two studies of race relations involve small samples of white students in integrated and segregated schools, and were done at different times and locations with no (apparent) controls for possible differences in the two populations.[4]

One of the achievement studies cited by AERA is mischaracterized as assessing "minority" achievement when in fact it looks at whole schools (segregated and desegregated), rather than at students, whose performance is the question.[5] AERA also refers to an unpublished paper by Armor and Watkins using NAEP data. (This study has now been published as an appendix to a briefing report by Armor written for the U.S. Commission on Civil Rights.)[6] Armor did find

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[3] Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY, vol. 90, 2006, at 751. The meta-analysis included non-educational settings, college settings, adults, and non-U.S. settings.

[4] Heidi McGlothlin et al., *European-American Children's Intergroup Attitudes about Peer Relationships*, BRITISH JOURNAL OF DEVELOPMENTAL PSYCHOLOGY, vol. 23, 2005, at 227 and Heidi McGlothlin & Melanie Killen, *Intergroup Attitudes of European American Children Attending Ethnically Homogeneous Schools*, CHILD DEVELOPMENT, vol. 77, Sept./Oct. 2006, at 1375. These two articles did not compare outcomes for white students at the integrated school with the segregated school.

[5] Kathryn M. Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, AMERICAN EDUCATIONAL RESEARCH JOURNAL, vol. 41, 2004, at 601.

[6] David J. Armor, Statement to the U.S. Commission on Civil Rights: *The Outcomes of School Desegregation in the Public Schools*, July 28, 2006. The 8th grade math effect was less than 4.5 points for a

(continued...)

segregation to have some impact on black math and reading achievement, but not on that of Hispanic children. Moreover, the size and direction of that impact varied enormously from state to state. In Virginia, New York, Illinois, and Georgia, for instance, no significant relationship between math achievement and school racial composition can be found.

Finally, the AERA brief emphasizes the study by Hanushek, et al. who were impressed by the very significant difference desegregation made in Texas schools. But a new paper by Armor and Duck presented at the Association for Public Policy Analysis and Management reports some computational problems in that work, raising questions about Hanushek's conclusion. The authors also replicated Hanushek's study using North Carolina data, and found that segregation had only a very small effect on math and reading achievement.[7]

The small amount of new research cited in the AERA and Social Scientists *amicus* briefs do not change the overall conclusion about the impact of racial diversity or racial balance on educational attainment. Since the impact of racial diversity is highly variable—depending on the period studied, the age of the students, their geographic location, the methodology used and other factors—that impact should not be elevated to the status of compelling government purpose.

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[6] (...continued)
60% difference in percent black, compared to a reading effect of only 2 points. On the 2003 NAEP tests, the black-white gaps are 35 points in math and 33 points in reading, so the effects in standard deviations are .13 and .06, respectively.

[7] David Armor & Stephanie Duck, *Unraveling the Effect of Black Peers on Black Achievement*, paper presented to the Association for Public Policy Analysis & Management, Nov. 4, 2006. The reading and math effects in North Carolina were approximately .05 standard deviation for a 50-point difference in school % black for 6 years.

B. Marginal Increase in Education Outcomes Does Not Rise to the Level of a Compelling State Interest

The function of public K-12 schools is to educate students. As the social science evidence shows, at best the educational benefits asserted by Respondents are only marginal. That is, it cannot be credibly asserted that racial classifications and racial balancing are essential to effective education. The overwhelming majority of school districts do not and many *could* not use race-based assignments—given their demographics. And yet the education they provide does not seem distinctively worse than in those with desegregation policies. For this reason, as well, racial diversity does not rise to a compelling state interest in K-12.

C. Racial Balancing Harms and Stigmatizes Children

Respondents claim that the racial balancing plan does not cause harm to children. Resp. Brf. at 44. To the contrary, it teaches children precisely the wrong lessons, and thereby harms them. This Court has repeatedly emphasized that state-sponsored racial preferences imposes real harms and costs on the individuals affected by them and on society at large. In *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), this Court explained: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." As this Court warned in *Shaw*, 509 U.S. at 643, racial preferences "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."

Nonetheless, Respondents argue that they should be permitted unfettered discretion to discriminate against schoolchildren in deciding what school a child should be assigned to based upon his or her skin color. Resp. Brf. at 21,

26, 38-40. Under Respondents' plan, it is not necessary to ascertain whether the dangers, and harms in the nature of stigma, racial hostility, and division outweigh the asserted educational benefits. That simply does not satisfy the demanding requirements of strict scrutiny because there is an inherent cost in classifying children and treating them differently on account of their race that cannot be eliminated by any amount of narrow tailoring. *See* Amicus Brief for Asian American Legal Foundation (AALF) describing the plight of Chinese American children in this country being denied assignment to K-12 public schools because of their race. The harm of telling schoolchildren that they will or won't be allowed to attend the school they prefer, depending on their skin color, is severe indeed. For example, Lee Cheng, Secretary of the AALF testified before the U.S. House of Representatives, Sub-Committee on the Constitution:

> Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends. Often they become ashamed of their ethnic heritage after concluding that their unfair denial is a form of punishment for doing something wrong.

AALF Brf. at 16.

Moreover, the burden of these racial balancing schemes fall heaviest on students from poorer and disadvantaged families who do not have the option of moving or sending their children to private schools. AALF Brf. at 3. *See* Amicus Brief of Various School Children from Lynn, Massachusetts at 3 (identifying the harm to families and children resulting from classifying students on the basis of race).

The use of discrimination to address naturally occurring housing patterns does as much to stigmatize children as any other discriminatory policy used by government. It teaches the lesson that race matters more than any other individual

characteristic. It is socially and psychologically myopic to assert that Respondents' plan will not, by its very nature, harm and stigmatize the children who are subject to it. No amount of narrow tailoring can eliminate these harms and it is too high a cost for these children to bear.

V

RESPONDENTS' PLAN IS NOT NARROWLY TAILORED

A. The Plan Is Not "Specifically and Narrowly Framed" to Accomplish Its Purpose; It Is an Impermissible Continuation of a Prior Remedial Plan

Refuting Respondents' arguments, the history of Respondents' 2001 Plan demonstrates it was not "specifically and narrowly framed to accomplish" its present stated purpose of promoting benefits for "everyone." *See Grutter*, 539 U.S. at 333. Instead, the plan is a continuation of a desegregation order framed in 1975—not to promote diversity—but to restore to black students their usurped constitutional rights, by eliminating "all vestiges of state-imposed segregation." *See McFarland*, 330 F. Supp. 2d at 841; *Newburg Area Council, Inc. v. Gordon*, 521 F.2d 578, 579 (6th Cir. 1975). Respondents proudly declare: "The Board has properly continued to achieve that goal by 'perpetuat[ing] without interruption, although with adjustment, the racial composition guidelines originally put in place by [the decree].'" Resp. Brf. at 35 (alterations in original). Indeed, the 2001 Plan betrays its remedial origin in that, for purposes of maintaining 15%-50% black student enrollment in each school, it classifies all students as either "black" or "white." *McFarland*, 330 F. Supp. 2d at 840 n.6. That is, white, Hispanic, Asian, American-Indian and all other non-black students are lumped together—a practice that makes no sense outside of the original purpose of desegregating schools with respect to black students.

Respondents are wrong to think that they may constitutionally continue to pursue the consent decree's "goal." As this Court explained in *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991), once a school district has been, as here, restored to unitary status, there is no longer justification for imposition of the remedial classifications; and any future voluntary plans must be evaluated "under appropriate equal protection principles." The situation is also similar to that in *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246 (5th Cir. 2005), where the school district insisted on continuing to use race-based admissions begun under a prior desegregation decree. As the Fifth Circuit explained, "the School Board's use of a racial quota supposedly pursuant to the 1981 Consent Decree but more than twenty years after the signing of the decree—and more than a decade after the 1990 [unitary] Order—is hardly a "starting point" and appears rather to be an improper "inflexible requirement." *Id.* at 260.

Therefore, by admitting that their plan is a continuation of the 1975 desegregation plan, Respondents concede the plan cannot have been "specifically" framed to accomplish any presently stated pedagogical purpose.

B. Respondents Use Race as the Defining Feature in Admissions in Order to Maintain Racial Balances

There is no merit to Respondents' somewhat contrary arguments that the plan merely uses race as a "tipping" factor, after considering other factors such as residence and choice; and that the plan "submerges race in a mix of other factors." Resp. Brf. at 41. As this Court found in *Grutter*, an admission plan may not "assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 307).

Respondents' plan shows nothing but forbidden racial balancing. Contrary to Respondents' assurances, in Jefferson County, race is never "submerged" in factors such as "residence" and "choice." Residence determines the available choices. *McFarland*, 330 F. Supp. 2d at 843. Then race determines whether a student's "choice" is attainable: "that student is assigned to his or her resides school unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines [i.e., near quota limits] . . . . Acceptance by transfer depends upon the racial guidelines and program capacity . . . the student is assigned to a school within his or her resides cluster depending upon capacity and the racial guidelines." *Id.* at 844-45. As the district court expressly found, "In a specific case, a student's race, whether Black or White, could determine whether that student receives his or her first, second, third or fourth choice of school." *See McFarland*, 330 F. Supp. 2d at 842. Respondents concede that Joshua McDonald's application was "denied under the guidelines." Resp. Brf. at 10. Thus, at the point where race is considered, race is always the defining factor.

C. By Arguing "Holistic" Evaluation Is Not Required in K-12 Admissions, Respondents Argue For an Unconstitutional Expansion of *Grutter*

By arguing that, because they seek only racial diversity, they need consider only race, Respondents concede their plan is not narrowly tailored under *Grutter*. *See* Resp. Brf. at 37-39. In *Grutter*, this Court held that, even where a university may lawfully use race, it must show that it evaluates an individual "holistically," without race as the "defining" factor. *Grutter*, 539 U.S. at 336-38. The Court found "individualized consideration in the context of a race-conscious admissions program" to be "paramount." *Id.* at 337. The requirement of individual consideration is consistent with this Court's teaching

that equal protection rights belong to the individual, not group. *See Adarand*, 515 U.S. at 227.

Respondents fail to show that their plan evaluates individuals holistically. Going further, they argue that a K-12 admission plan promoting "racial integration" may consider race alone and that there is "no need even to require the use of the 'criteria' " found paramount in *Grutter*. *See* Resp. Brf. at 40. Clearly, Respondents concede that their plan fails under the standards articulated in *Grutter*, while arguing for an expansion of its holdings beyond constitutional limits.

D. Respondents' Plan Operates as a Quota

Respondents' attempt to create a semantical difference between their "flexible" "guidelines" and a "quota" is absurd. "Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." *Grutter*, 539 U.S. at 335 (internal quotations omitted) (quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495 (1986)). Far from flexible, the plan "requires each school to seek a Black student enrollment of at least 15% and no more than 50%." *McFarland*, 330 F. Supp. 2d at 842. District schools enforce this balance. *See id.* at 857; Resp. Brf. at 42. Therefore, there is both a "percentage which must be attained" and a "percentage . . . which cannot be exceeded." This is patently a quota, similar to "diversity" quotas found in other cases. *See, e.g., Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 856-57, 861-62 (9th Cir. 1998) (San Francisco school district imposed "quota" requiring four racial groups at each school and capping each race at 40 or 45 percent.).

The plan bears all the hallmarks of a quota system. It is unrefuted that Joshua McDonald was denied admission to his neighborhood school because of his race, even though there were empty desks at the school. JA 70. Thus, there were "seats" from which Joshua was "insulated" because of his race and for which he was not allowed "to compete," exactly as is

the case with a quota. *See Grutter*, 539 U.S. at 334; *Bakke*, 438 U.S. at 315. Also, the plan seeks to enroll a strictly defined range of black students, quite unlike the undefined "critical mass" of minority students found not to constitute a quota in *Grutter*. 539 U.S. at 335-36. As Joshua's example illustrates, there is absolutely no "flexibility" or "choice" when a child runs afoul of the district's quota system. Respondents' impermissible goal is "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'" *See id.* at 329 (quoting *Bakke*, 438 U.S. at 307).

E. Respondents Failed To Pursue Race-Neutral Alternatives

Respondents' contention that they properly considered less restrictive or race-neutral alternatives is contradicted by the record. *See Grutter*, 539 U.S. at 340 ("the Law School sufficiently considered workable race-neutral alternatives"). Respondents say the Board of Education concluded random sampling and socio-economic criteria " 'do not provide an adequate substitute for the use of racial . . . identity factors.' " Resp. Brf. at 48 (citing case; alteration in original). However, a search for exact proxies for race hardly constitutes honest consideration of race-neutral alternatives. In fact, many school districts that have looked beyond race have found that socio-economic integration plans are very effective in promoting educationally-useful diversity.[8]

As previously stated, the plan is not "specifically" framed to meet Respondents' presently-stated pedagogical goals at all.

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[8] *See* Richard D. Kahlenberg, The Century Foundation, *Economic School Integration: An Update*, Sept. 16, 2002, *available at* http://www.tcf.org/Publications/Education/economicschoolintegration.pdf ("The number of students attending public schools with economic integration plans has jumped from roughly 20,000 in 1999 to more than 400,000 today.")

Instead, after the district was declared unitary in 2000, Respondents simply continued the 1975 court-ordered remedial plan "without interruption." Resp. Brf. at 35; *McFarland*, 330 F. Supp. 2d at 841. It therefore strains credulity that the 15%-50% desegregation range, used in the present non-remedial context, can be anything but capricious. *See Croson*, 488 U.S. at 507 (arbitrary 30% racial quota "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

Respondents misleadingly suggest that in large part they use race-neutral alternatives, because, they say, many student assignments are made without recourse to race. *See* Resp. Brf. at 48. In fact, except for the minority of students attending magnet and certain other schools not subject to the 15%-50% quota, *all* district students are classified by race—whether or not they are ultimately assigned based on those racial classifications. *See Ho*, 147 F.3d. at 862 ("classification" consists of forcing parents to check off "box" designating race of child).

Respondents also incorrectly suggest they must use race to prevent "probable resegregation," pointing to the *Hampton II* findings. Leaving aside Respondents' apparent confusion as to the difference between *de jure* and *de facto* segregation, in fact, in *Hampton II*, the district court found, examining several available options, that without the racial assignment plan, the district could easily maintain considerable racial diversity. *See Hampton*, 102 F. Supp. 2d at 371 n.29. "If JCPS could still use its resides areas in conjunction with maximum school choice, virtually none of its middle or high schools would be outside 15%/50%, though many elementary schools would." *Id.* Of course, Respondents insist on maintaining exactly the same racial balance mandated by the desegregation decree—without any showing that the mandated racial mixtures work any better at producing educational benefits than the racial diversity that would be achieved without the imposition of racial

classifications. Again, because Respondents' goal is racial balancing for its own sake, they failed to explore obvious race-neutral alternatives.

CONCLUSION

For these reasons, the decision below should be reversed.

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Respectfully submitted,

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